

***United States Court of Appeals
for the Second Circuit***

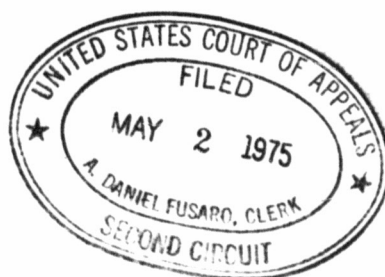


**SUPPLEMENTAL
BRIEF**

74-2639

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-versus-

74 Cr. 159

PHILIP STOLLER,
MARTIN FRANK,
JEROME ALLEN
ALFRED T. HERBERT,

Defendants.

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New York, N.Y.
May 31, 1974
2:15 p.m.

Before:

Hon. Harold R. Tyler,

District Judge.

APPEARANCES:

PAUL J. CURRAN, Esq.
United States Attorney for the
Southern District of New York

By: IRA LEE SORKIN, Esq.,
Assistant U. S. Attorney

SHEA, GOULD, CLIMENKO & KRAMER, Esqs.
Attorneys for Defendant STOLLER

By: MILTON GROULD, Esq.
RONALD ALENSTEIN, Esq., of Counsel

FELDSHUIH & FRANK, Esqs.

Attorneys for Defendant FRANK
By: SIDNEY FELDSHUIH, Esq.
DONALD A. DERFNER, Esq., of Counsel

(Case called.)

MR. ALENSTEIN: If your Honor please, my name is Ronald Alenstein of Shea, Gould, Climenko & Kramer. We represent defendant Stoller.

We have gotten into the case relatively recently, your Honor, and you may recall that certain motions were filed on behalf of Mr. Stoller prior to our substitution.

THE COURT: Correct.

MR. ALENSTEIN: We have asked the Court to rule upon them.

THE COURT: Hold on. No, you haven't quite. There was one of the more absurd motions --

MR. ALENSTEIN: Which we did withdraw.

THE COURT: Which I am happy to say that your office had the good sense to say that you are withdrawing.

Are there any others than that one mentioned in your papers that you are withdrawing?

MR. ALENSTEIN: Your Honor, the motion for particulars was done by previous counsel I don't think needs to be considered by your Honor because we asked for particulars also, and I think we have included everything that he had asked for.

THE COURT: All right.

MR. ALENSTEIN: There is one thing that I would

2 like to speak about in the previously filed motions, and that
3 is the motion addressed to the property which was seized at
4 the time of Mr. Stoller's arrest.

5 THE COURT: We are going to have to have a hearing
6 on that, aren't we; an evidentiary hearing?

7 MR. ALLENSTEIN: I think it's very likely, although
8 it may be that just on the facts that we have got considered
9 by the government, your Honor could grant.

10 I am sure that Mr. Sorkin will correct me if
11 there is a dispute about anything here, but here is what I
12 think is considered. On the eve of Thanksgiving, 1973,
13 Mr. Stoller arrived at Kennedy Airport from out of the
14 country. At that time he was arrested pursuant to an arrest
15 warrant issued upon the filing of the indictment, which the
16 present indictment supersedes. There had been an indictment
17 numbered 73 Crim. 1050 which contained only what is now the
18 substantive Counts 11 through 16 of this indictment.

19 At the time of the arrest Mr. Stoller had with
20 him a suitcase, as many travellers do. The suitcase was
21 seized and the suitcase was opened. Inside there were two
22 envelopes which were closed.

23 THE COURT: May I interrupt. I hear this many
24 times from Stoller himself and from his previous lawyer and
25 so on.

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2 MR. ALLENSTEIN: I didn't realize that.

3 THE COURT: What I am really concerned about,
4 and maybe I should address this to Mr. Sorkin, is unless
5 there is agreement on this I think we are going to have to
6 have a hearing.

7 I surmise that to some of this the government
8 disputes. I don't know. What about it, Mr. Sorkin?

9 MR. SORKIN: Your Honor, right from the beginning
10 our position was the search and seizure was proper.

11 THE COURT: There was quite a bit of talk about
12 that.

13 MR. ALLENSTEIN: I thought it was before other
14 judges. I didn't realize it was before you.

15 THE COURT: You are right about that and discount-
16 ing what happened before with other judges, this particular
17 agent of the Court upon who you are now gazing has heard
18 about this quite considerably from Mr. Stoller himself and
19 his previous counsel.

20 I don't think the government would consent to
21 say that the facts are quite the way that you say they are
22 and I think we have got to have a hearing. So why don't we
23 just accept that, and I have your papers on that.

24 It seems to me now it is my burden to fix a hearing
25 date for that, but let's let that one go.

How about particulars? Hasn't the government in large measure consented to grant particulars -- I should say furnish particulars pretty much as your office seeks?

MR. ALLENSTEIN: They furnished some, your Honor. I am not accusing the government of any sort of bad faith here. They have declined to furnish some particulars that I had thought were so customary and so obviously necessary that we have put something about them in our reply brief.

What I am talking about in particular is -- I take it your Honor doesn't want me to argue about the various legal reasons the government has put forth in its brief, citing mainly pre-1966 cases for declining things. I will just go right to the items.

THE COURT: Let's get down to the core of this. What is it that you say that you really need and which the government is resisting? Could you list them seriatim?

MR. ALLENSTEIN: Certainly.

Your Honor, we have asked for the government to tell us whether there are any parts or objectives of the conspiracy and whether there are any means of committing the crimes alleged which are not set forth in the indictment. You have the customary language, the indictment says that among the means by which the crimes were committed are the following and we just want to know if that's all and the

1 government has declined to tell us that. This leaves it open
2 to them to spring something on us and I don't think that's
3 right.
4

5 In Count 1 there are allegations that there are
6 other unnamed co-conspirators. We asked who those are and
7 the government has, I believe, told us as best it can.

8 In Counts 2 through 10, however, there is the
9 allegation that the substitute securities frauds there
10 alleged were committed by the defendants and "others." We
11 have asked the government to tell us who these others are.
12 It may be that they are the co-conspirators already alleged
13 as to Count 1, but the government won't say. It won't say
14 anything. I think we are entitled to know who the others
15 are.

16 In Counts 11 through 16 -- now, your Honor will
17 recall these are the false testimony before the SEC counts
18 against Mr. Stöller. We have asked the government to specify
19 the respects in which it is claimed testimony was false. We
20 asked them to set forth what they claimed the true state of
21 affairs to have been with respect to the subject matter of
22 each question. The government has declined to do the latter
23 and has, I suppose, nominally agreed to do the former; that
24 is, to state the respects.

25 THE COURT: They certainly have to do the former,

2 but why do they have to do the latter?

3 MR. ALENSTEIN: The problem is their statement in
4 which the statements were false amounts just to a reiteration
5 of the indictment.

6 One example is this: in a portion of his SEC
7 testimony Mr. Stoller said that Mr. D'Onofrio had said
8 training with the pros looked like an interesting proposition.
9 The interrogator then said to him, "Well, did he say anything
10 else?"

11 Mr. Stoller said "Nothing of any consequence."

12 So we asked for the respects in which that was
13 false and the government's bill of particulars said it was
14 false because D'Onofrio said more than "nothing of any
15 consequence."

16 This is no more than just saying the answer was
17 false. It doesn't specify the respects in which it was
18 false. It seems to me if they claim that that answer was
19 false they ought to tell us what they say D'Onofrio said.

20 This is an example, your Honor, of the reason why
21 the manner of the government's response doesn't help.

22 THE COURT: All right.

23 MR. ALENSTEIN: In the conspiracy count, Count 1,
24 your Honor, there are a number of means paragraphs, a great
25 many means paragraphs, and certain of them, three to be exact,

raise questions which we think are of great significance.

O One of the means paragraphs -- and I am sorry I don't have the number of which one it is -- that the defendants Stoller and Jerome Allen assigned shares that they had been -- well, assigned shares of Training with the Pros to various persons, nominees.

MR. SORKIN: That's F and G of the indictment, sir.

MR. DERFNER: SF and G. I have a copy for your Honor of the indictment.

MR. ALLENSTEIN: If these means Paragraphs, your Honor, are intended to tell the story of the alleged conspiracy chronologically, and it seems that they are, then these shares assigned by Stoller and Allen were allegedly assigned prior to the time they received any in any public offering because Training with the Pros had not made its offering at the time.

We have asked the government to state what the source was of the shares it is alleged Stoller and Allen assigned to people. That's been declined. It raises a serious question in view of the facts. We would like to know whose shares it is claimed these were and where they got them.

Now, in another means paragraph it is said that defendants, and there has been no indication of which, later took their 14,900 shares which had been delivered into Swiss

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2 bank accounts and sold them at \$50 a share.

3 Now, we have asked the government which defendant
4 or which of the defendants ordered that done. The government
5 won't tell us. That seems to me elementary. If one of them
6 gave the bank an order to sell the shares at \$50 a share,
7 they ought to be able to tell us who. If all three of them
8 did it, the government can say that. If the government
9 doesn't know, it can say that.

10 Finally, it is claimed that the defendants in the
11 course of a scheme to manipulate this stock stimulated the
12 market price by causing brokerage firms to recommend the
13 stock to their customers.

14 It also seems elementary to me that the government
15 should tell us what brokerage firms and who did it and that
16 they decline to do. It seems to me that that is something
17 that would normally be given and ought definitely to be given
18 in this case.

19 THE COURT: All right.

20 MR. ALLENSTEIN: I think that's all I would like
21 to argue to your Honor on the particulars.

22 THE COURT: You have a motion here to strike?

23 MR. ALLENSTEIN: That is right. We have, I think,
24 three more motions that I want to talk about, your Honor:
25 the motion to strike portions of the indictment and the motion

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2 for discovery and inspection and the motion addressed to the
3 bail. I will take them in any order your Honor wishes.

4 THE COURT: I don't care. I have in front of me
5 your motion to strike.

6 MR. ALLENSTEIN: Fine.

7 The motion to strike, your Honor, is somewhat
8 unusual in that we couldn't find any cases which deal with
9 this kind of problem in the context of an indictment under
10 Section 1001. There are a number of perjury cases which
11 demonstrate that there are some kinds of testimony for which
12 a man cannot be indicted because it is the duty of an inter-
13 rogator when he has got a witness under oath to pin that
14 witness down; to ask him the question right.

15 Now, some of the questions here --

16 THE COURT: If you are right about that it will
17 certainly cause a revolution in the way assistants handle
18 grand jury witnesses.

19 MR. ALLENSTEIN: If your Honor will forgive me,
20 I think there ought to be one. We have had a number of
21 indictments in our office just lately arising from inter-
22 rogations that took place some years ago and the assistants
23 are no longer employed in the U. S. Attorney's office now,
24 but you should see how some of these questions have been
25 asked. It was a butchering.

2 THE COURT: Don't be too critical. I can think
3 of some questions I have heard people, including people in
4 your office, ask. And I have heard questions that I have
5 asked which in hindsight looked perfectly dreadful, but so
6 what?

7 For example, if you look at Count 11. Granted,
8 you could say or Mr. Gould could say or even I could say that
9 maybe that isn't the greatest question we ever heard in our
10 life, but the witness was astute. He listened and he went
11 at it.

12 MR. ALLENSTEIN: Your Honor, I suppose it is
13 possible to attack these questions and it is possible to
14 defend them, but I think maybe the best example of what our
15 problem is here -- at least what one of our problems here is
16 is found in Count 16, which is on the last page of the
17 indictment.

18 It seems to me that you shouldn't send a man to
19 trial on this kind of thing:

20 "Q Do you know of Mr. Allen owns" -- using the
21 present tense -- "any stock of Training with the Pros?"

22 "A I have no knowledge."

23 Now, it should be understood that the witness'
24 knowledge was being called for as of the moment the question
25 was being asked, and second of all, the witness made very

2 clear that he was talking about knowledge as opposed to
3 information because he understood the difference.

4 THE COURT: I must have missed this.

5 MR. ALLENSTEIN: You are right, Judge. I did
6 jump some.

7 THE COURT: There are three counts you are really
8 attacking: 11, 15 and 16; right?

9 MR. ALLENSTEIN: In our motion we also talk to --
10 we address ourselves to a question and answer in Count 12,
11 several of them in fact.

12 THE COURT: All right.

13 MR. ALLENSTEIN: And in 13.

14 THE COURT: And Count 15 and 16?

15 MR. ALLENSTEIN: You find another example of this,
16 Judge, in Count 12, and that's the question that I referred
17 you to before.

18 THE COURT: What page are you on now?

19 MR. ALLENSTEIN: It is page 18 of the indictment.

20 THE COURT: No, I am following your motion papers.

21 MR. ALLENSTEIN: It is on page 2 of our Schedule
22 3 to our motion.

23 THE COURT: Yes. That is what I am looking at.

24 MR. ALLENSTEIN: It is at the bottom of that page
25 and this is the question that I mentioned to you before in

2 another context.

3 "Q What did Mr. D'Onofrio say to you about
4 Training with the Pros outside of the statement "It looked
5 interesting?"

6 "A Nothing of any consequence."

7 Judge, it is quite plain that Mr. Stoller did not
8 deny that D'Onofrio said further things to him, and if the
9 interrogator wanted to know what they were he should have
10 asked him.

11 When the man says "nothing of any consequence,"
12 it seems to me that by indicting him what you are telling him
13 is that he ought to have judged in advance of any indictment
14 or charge what was of consequence and that I don't think you
15 can do. There is no way to test his state of mind.

16 THE COURT: All right.

17 MR. ALLENSTEIN: Another kind of problem with
18 Counts 11 through 13, and we have outlined these for you
19 in Schedule 3, is that the indictment, I don't think, conforms
20 to the sixth amendment. In a number of places in those
21 counts, Judge, the government has set forth excerpts of the
22 testimony and has put a question, followed it with an answer,
23 followed that with three asterisks and followed it with another
24 answer, another portion of an answer. If you read it it looks
25 as if this was an answer to a question. In fact, it was not.

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I think we said in our papers that we would offer to hand up a copy of the SEC testimony in toto, and if your Honor would like it, I have it, but what happened here was that the indictment pulls answers and portions of answers and sentences out of answers from all over this transcript. In a number of places you see that the indictment alleges one thing to have been given in answer to a question when in fact it was given in answer to a totally different question ten pages later.

THE COURT: Let's turn to your discovery motion. Hasn't that been consented to in large part?

MR. ALLENSTEIN: All but the most important and vital things, your Honor.

THE COURT: What is that or what are they?

MR. ALLENSTEIN: Your Honor is familiar with this indictment, so you know the extent to which Swiss bank accounts are at the very heart of this. Everything seems to revolve around the Swiss bank accounts.

Obviously the first thing that came into our mind is let's see the records of the Swiss bank accounts. Let us see the powers of attorney, the new account cards, the transcript of the transactions and the instructions to have transactions in the account.

THE COURT: May I interrupt you again to ask you,

2 Mr. Sorkin, what about this, Mr. Sorkin? The extent the
3 government has any Swiss records, shouldn't those be disclosed
4 no matter how unimportant or important you think they may be?

5 MR. SORKIN: Your Honor, to the extent that the
6 government has those records as they pertain to Mr. Stoller's
7 own account, or to Mr. Frank's own account, we alleged that
8 Stoller had Shirley and Frank had Lance.

9 I agree with your Honor and I think we consented
10 to that. We said insofar as the government has such records.

11 THE COURT: We can't ask you to disclose anything
12 you don't have.

13 MR. ALLENSTEIN: My set of government papers reads
14 differently from what Mr. Sorkin just said. He said they
15 opposed, except -- if I didn't hear correctly, I apologize.

16 THE COURT: You don't have to apologize. It seems
17 to me given the nature of this case as you argue it I would
18 think that the government should and would consent to dis-
19 closure of any Swiss bank documents or xeroxes thereof,
20 particularly as they pertain to your client's account and he
21 is willing to expand on that to Mr. Martin Frank's records.

22 MR. SORKIN: Your Honor, I think just on this
23 point there may be some confusion here because Mr. Frank
24 asked for at least a half dozen different accounts. He,
25 through code names in there on a number of accounts, including

1 Lance and Shirley. We opposed, except insofar as we had such
2 records as they pertained to Mr. Stoller and Mr. Frank, and
3 if we have those records we will gladly turn them over for
4 inspection to defense counsel.
5

6 THE COURT: Then I think what I am going to do,
7 since I believe that documents are more important than a lot
8 of this other material that's being argued about -- frankly,
9 I'm going to direct here and now that that be done. If the
10 defendants still feel whenever they see that material that
11 there is something else that they have been kept from and
12 that you have it, why, then, you can apoly at that time, but
13 I think to whinny here this afternoon about this subject is
14 really not relevant because I am in sympathy to your basic
15 position.

16 MR. ALLENSTEIN: Can I add one thing? I think
17 we ought to get all four counts named in the indictment,
18 because we are going to be charged in D'Onofrio's count,
19 Gypsy, and in Allen's account, because it is going to be
20 proved against us or offered.

21 THE COURT: Is that true? I would assume it is.

22 MR. SORKIN: They are going to be charged, your
23 Honor, with --

24 THE COURT: They are charged.

25 MR. SORKIN: They are charged. I don't know how

to answer Mr. Alenstein's question. We would oppose the disclosure of Mr. Allen's records and Mr. D'Onofrio's records.

THE COURT: Wait a minute. Are you saying that you would oppose even those that you intend to offer in evidence?

MR. SORKIN: This gets into other areas, your Honor. We may have other witnesses who have bank records and if we disclose Allen's and --

THE COURT: Forget that. We are not talking about other witnesses. Allen and D'Onofrio are two rather particular people. Let's be honest about it.

MR. SORKIN: That is correct. We concede that, your Honor.

THE COURT: Let's not worry about other witnesses. That is one of the troubles with these great arguments. We always worry about everything and anything under the sun, even though it is not before the Court. I don't blame you for worrying, but let's not worry on our time here. Let's agree now that if you are going to offer any of these accounts or any papers from the accounts of these gentlemen, show them to the defense.

MR. SORKIN: As to Allen and D'Onofrio as well?

THE COURT: Sure. They are part of the warp and woof of this thing, and don't worry about other unnamed

witnesses. We are too naive to even hear such talk at this point.

MR. SORKIN: Very well.

THE COURT: Are you satisfied, Mr. Alenstein; and I am holding open to you, by the way -- once you look at this material, and this goes to you, Mr. Feldshuh --

MR. FELDSHUH: Well --

THE COURT: Don't say a word. I am speaking for you.

MR. FELDSHUH: I agree. Just two words, Judge.

THE COURT: All right. What's next?

MR. ALENSTEIN: I just have one or two other items of discovery, your Honor, admittedly of lesser importance than the Swiss things, but still of some importance.

We have asked the government to give us the items it is going to offer to prove that the defendants used the mails, and we have asked them to show us -- I think this next thing is of considerable importance, the confirmations of the brokerage transactions.

Now, the indictment alleges the various transactions--

THE COURT: Stop a minute. You want confirmations, right?

MR. ALENSTEIN: Not every confirmation, Judge.

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2 I have limited it.

3 THE COURT: No. You want confirmations, all
4 right?

5 MR. ALLENSTEIN: Yes.

6 THE COURT: Mr. Sorkin, wouldn't you agree in
7 this happy year of our Lord that they are entitled to see
8 any confirmations you have no matter how tangential they may
9 be?

10 MR. SORKIN: Your Honor, we would be happy to
11 show them the confirmations. The only thing that worried
12 us is that going beyond the names in the indictment, would
13 we be limited in producing additional confirmations in intro-
14 ducing additional jurisdictional means if we show them the
15 confirmations that are alleged in the indictment, then we
16 are estopped at a later date.

17 THE COURT: You never struck me as being this
18 much of a worry-wart. Don't take it that way.

19 MR. SORKIN: I have got a nervous client, your
20 Honor.

21 THE COURT: No, don't kid me. That's not so.
22 You know that.

23 The confirmations which they are seeking seem to
24 be realistic. They seem to be of no prejudice to the govern-
25 ment and I can assure you that if you should make a mistake

2 and not have certain ones that happened to have existed at
3 one time, any trumpeting by defense counsel will fall on
4 deaf ears in mine. I am not asking you to give them anything
5 again that you don't have. They are entitled to come into
6 your office and discover and look at these things.

7 MR. SORKIN: Very well, your Honor.

8 THE COURT: They will not fall over in a faint
9 when they see a few confirmations.

10 Now, what's next, Mr. Alenstein?

11 MR. ALENSTEIN: I believe I just have one more
12 thing, and that's a motion under Section 3146 for an order
13 amending the conditions of Mr. Stoller's release.

14 THE COURT: Just a minute, would you? Refresh me.
15 This is a subject that has been discussed perhaps more than
16 the recent disengagement of troops in the Golan Heights at
17 one point in our year before your office came into the
18 matter. What now?

19 MR. ALENSTEIN: First, I think the prior discus-
20 sions, your Honor, were not on the basis of papers, affidavits,
21 evidence, so forth.

22 THE COURT: Forget the details. What is it you
23 seek?

24 MR. ALENSTEIN: In any event, I will try to bring
25 your Honor up to date.

2 As I understand it, at the time of the original
3 arrest on the prior indictment Mr. Stoller was -- well, after
4 a lot of arguing, which I won't recite in detail.

5 THE COURT: Please don't. I read some of the
6 record.

7 MR. ALLENSTEIN: He ultimately was obliged to post
8 cash bail or a surety bond in the amount of \$100,000. He
9 did that and I understand that an order was made which
10 permitted his release on the present indictment on those
11 terms. It permitted that bail to cover it.

12 Now, in order to get that he was obliged, your
13 Honor, to post cash collateral in the amount of \$50,000 with
14 the company. He didn't have the \$50,000 and he borrowed it
15 from a corporation of which he owns five percent and relatives
16 of his own the remainder. He has borrowed all he can. I
17 mean, the well is dry as far as that.

18 THE COURT: Fine, but where are we going? This
19 is all very interesting, but what is the problem? That's
20 what I don't understand. It was done.

21 MR. ALLENSTEIN: First he needs money for his
22 defense. He needs to defend himself and having to keep this
23 \$50,000 up with this bonding company is preventing him from
24 doing it.

25 Secondly, your Honor -- you know, I don't want to

2 start reciting cases and legislative history, but I am sure
3 your Honor knows what we are going to argue. Monetary
4 conditions of release are supposed to be the last resort.
5 Why is it that they should be imposed in this case? I think
6 there is no reason whatever.

7 I don't know how well you know Mr. Stoller, but
8 we have given you what we can by way of background in the
9 moving papers. The man has no criminal record. He has never
10 fled to avoid prosecution.

11 THE COURT: Wait a minute, please. I am sorry,
12 but I have heard all of this before. Another judge heard it.
13 I think two other judges heard it. Isn't it a little late
14 in the day for this?

15 MR. ALLENSTEIN: I have read the transcripts of
16 what the judges heard, your Honor. It may be my own paranoia.
17 It didn't seem to me as if they got the full story, as if
18 they got all the facts.

19 THE COURT: That may be, but all you're asking
20 me to do is second guess some other judge, which I don't
21 like to do.

22 MR. ALLENSTEIN: It was never demonstrated to any
23 previous judge in this case, your Honor, the extent to which
24 his ability to defend himself is going to be prejudiced by
25 his inability to get back this money.

2 THE COURT: What you want to do, in other words,
3 is you're seeking to have \$50,000 returned to him.

4 MR. ALLENSTEIN: I am seeking an order which will
5 permit him to be released on his own recognizance, or --

6 THE COURT: The government is afraid he is going
7 to take off again.

8 MR. ALLENSTEIN: You know, the government's
9 feelings really aren't the criteria and I think it is up to
10 your Honor to decide whether those fears are justified. I
11 don't think the government has offered anything.

12 THE COURT: I am sorry, Mr. Alenstein, but I
13 really am concerned. One, it is very late in the day.
14 Two, I went through some of this. I did clip the government
15 on one thing. They lifted his wife's passport, you remember.

16 MR. ALLENSTEIN: I am aware of that.

17 THE COURT: What else have we got for this man,
18 I don't understand you, particularly since he has an ability
19 to fly abroad, and I don't blame him for that, but the
20 government will argue with some cogency that he shows some
21 signs of getting in and out of the country and they don't
22 want to see him go.

23 MR. ALLENSTEIN: I don't know if he has ever shown
24 signs of being able to get in and out of the country without
25 a passport, Judge, but the real problem is perhaps due process

2 of law. I am not trying to be theatrical, really, but it
3 seems to me that in this kind of a case involving this kind
4 of an alleged massive conspiracy it is an expensive defense.

5 THE COURT: Now, again, maybe you've got some-
6 thing, I don't know, but I still don't understand. What is
7 it you want this Court to do specifically?

8 MR. ALENSTEIN: Reduce the bail drastically or --

9 THE COURT: To what?

10 MR. ALENSTEIN: Frankly, your Honor, it would
11 have to be a minimal amount, and I don't think there is much
12 difference between a minimal amount and nothing, but I would
13 suggest \$5,000.

14 THE COURT: I don't know what you mean by
15 minimal amount. That is why I am asking.

16 MR. ALENSTEIN: I would suggest \$5,000.

17 MR. SORKIN: Your Honor, I really don't want to
18 rehash this again, and I am not going to. The conditions
19 that existed in November of 1973 exist today. With or with-
20 out a passport if Mr. Stoller really wants to leave this
21 country we know he can leave this country. It is very easy
22 to get a passport.

23 He is out on bail. He made bail immediately after
24 Judge Gagliardi set the figure at \$100,000. There was no
25 delay. There were no claims that he needed the money. It

2 was just there like that.

3 Our position still is at this time he is out, he
4 is not incarcerated. The purpose of bail is that it insures
5 his appearance and nothing could be more of an assurance
6 than his attorney's reminding him that you'd better not
7 skip the country because you are going to owe us money for
8 your defense.

9 MR. GOULD: Can I say something about this
10 subject, your Honor? I don't want to intrude myself. I have
11 heard this kind of thing so many times that I think it is
12 absurd. If a man like Stoller wants to flee the jurisdiction,
13 it really doesn't matter whether bail is \$5 or 10 or 50,000.

14 I actually stood in this courthouse years ago
15 and heard an impassionate demand by the government for
16 \$100,000 bail on Louis Wolfson, who was supposed to have
17 \$100,000,000 and the argument was that that would keep him
18 here.

19 The bail isn't going to keep this man here, your
20 Honor. What keeps this man here is that he has got a wife
21 and children and a home. He has never been out of this
22 jurisdiction, except on business. This isn't a man with a
23 demonstrated record that he is a fugitive. I don't know why
24 we have to listen to this kind of thing.

25 I haven't seen one shred of evidence that this

man wants to leave the jurisdiction.

MR. SORKIN: Apparently, your Honor, the affidavit Mr. Gould has not seen because in the affidavit we filed back in November there were clear references from extremely reliable informants that Mr. Stoller at least was contemplating very seriously absconding from the United States.

MR. GOULD: The operative word is clearly "reliable."

I have talked to this man many times. I wouldn't take this responsibility on this motion if I thought there was any substance to this.

THE COURT: I don't know what affidavit you are talking about. Was this something before Judge Gagliardi?

MR. SORKIN: No, your Honor. This is the affidavit on the warrant for the arrest of Mr. Stoller that was filed with the Magistrate.

THE COURT: I haven't seen it.

MR. GOULD: Unnamed informants. I would like to have one of these informants on the stand for 15 minutes, and on the basis of that a man is deprived of the only money he has to defend himself.

THE COURT: I will tell you what I am going to do. I'm going to ask him to sign a PRB of \$100,000, the same amount, and I'm going to condition that upon him putting

up either \$10,000 cash or a security bond.

MR. GOULD: I think that's a fair treatment, your Honor, because I must say that I never did see that affidavit.

THE COURT: It is true I think Mr. Sorkin mentioned it to me once before, but I do think I never did clearly understand quite what had happened, and I'm willing to second guess a fellow judge now, because I think a lot of different things have happened since last November, including counsel of reputation coming into this case for him and so on and I think maybe I will content myself with that.

However, that is it and I want no more bail applications at any time. We have done more in this case that has so little to do with the merits of the case that I really think that that's enough on this.

MR. GOULD: Let me make this suggestion to finalize it, your Honor. Let him post \$5,000 bail and he will sign the recognizance bond in \$100,000.

THE COURT: No. \$10,000.

MR. GOULD: I thought I could chisel the extra \$5,000.

THE COURT: You are very persuasive, but you can't.

MR. GOULD: All right, I won't fight with you.

MR. SORKIN: Can I just say one thing, that his

2 wife also cosign the personal recognizance bond?

3 THE COURT: That's fair enough.

4 MR. GOULD: Why should she do that? I am sure
5 she will, but why is that request made?

6 MR. SORKIN: The request is made, your Honor,
7 because of the argument that Mr. Gould makes that Mr. Stoller
8 would not leave with his wife and children and certainly
9 his wife would have no objection to signing.

10 MR. GOULD: Why should a woman be asked to do
11 this? That's not an argument to be made. She is not in
12 this case in any way.

13 THE COURT: I know that.

14 Does she work or something?

15 MR. SORKIN: Your Honor, the bottom line really
16 is we don't know who owns the assets that Mr. Stoller
17 allegedly owns. We have reason to believe assets may have
18 been transferred into his wife's name.

19 MR. GOULD: If there is any evidence of that --
20 if Mr. Sorkin is prepared to present any evidence of that
21 kind I will consent that she sign it, but if he is not
22 prepared to do it, then it is an irresponsible statement.

23 MR. SORKIN: Your Honor saw certain documents
24 we received from Mr. Stoller. There are references in those
25 documents which were submitted in camera that makes reference

1 to certain amounts of moneys to his wife or from his wife in
2 a certain account and in a certain color.

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4 MR. GOULD: I think it is shocking. If it came
5 from his wife all the less reason for suggesting it. If it
6 went to his wife and he will show it to me I will consent to
7 it, your Honor, but I think that this is a little game that
8 Mr. Sorkin is playing of putting pressure on Stoller and I
9 think it is oppressive to ask the woman to sign the
10 recognizance bond. I have never heard of it being done in
11 this court.

12 THE COURT: It is being done with increasing
13 frequency.

14 MR. GOULD: In a very extreme case, your Honor.

15 THE COURT: That doesn't mean that it has to be
16 done here.

17 I won't ask that she do it now, Mr. Sorkin.
18 However, if you feel that you have got some evidence of a
19 recent vintage which shows that a good deal of what might
20 have been his earnings have been transferred to her or some-
21 thing, why, I will be glad to reconsider it. I think at the
22 moment it is enough to simply require that Mr. Stoller sign
23 the PRB and that he post either \$10,000 cash or a security
24 bond in that amount with a good surety. I will give him
25 until Monday afternoon at 4:00 o'clock to do that.

MR. GOULD: Thank you very much, your Honor.

THE COURT: Now, Mr. Sidney Feldshuh --

MR. GOULD: May I just ask one question of your Honor? I came here principally because I thought maybe at this time your Honor would talk about a trial date.

THE COURT: I would like to. Unfortunately --

MR. GOULD: I will wait until Mr. Feldshuh argues.

THE COURT: I think we should at long last, but let's hear Sidney Feldshuh.

Having heard all this great discussion, is there anything missing in discovery that you feel that Mr. Alenstein has overlooked from your client's point of view?

MR. FELDSHUH: Your Honor, with your Honor's permission I have asked Mr. Derfner of our office to handle this matter. Will you hear from Mr. Derfner in that regard?

THE COURT: I will.

Mr. Derfner, what else other than what's already been delineated this afternoon do you have?

MR. DERFNER: Two things of substance, your Honor.

First, there will be a clarification of what records of Swiss bank accounts that will be forthcoming. Your Honor limited it to the records that Mr. Sorkin intends to introduce. If that includes the records of Weissinger

2 and Bonavia, the alleged victims of this scheme, then that's
3 fine, there is no problem. If it does not, then I ask that
4 that ought to be forthcoming also.

5 MR. SORKIN: Your Honor, I thought it was
6 limited only to Stoller, D'Onofrio, Frank and Allen.

7 THE COURT: That is what I thought.

8 MR. DERFNER: Then we would request that it be
9 inclusive of Bonavia and Weissinger. According to the
10 indictment the shares of stock of Training with the Pros
11 were transferred into the account of Weissinger and Bonavia.

12 THE COURT: Even assuming that as being true,
13 what does that add to the picture?

14 MR. DERFNER: Are we to accept that allegation
15 as fact, your Honor?

16 I think that it must stand the proof --

17 THE COURT: The government has got to prove it
18 if they allege it, so why take up their burden for them?

19 I think the real point is, though, that I don't
20 see what good they do the defendants particularly, because
21 as I recall it that was just part of the picture. It isn't
22 of any significance, except that the government has to prove
23 it.

24 Mr. Sorkin, why not? If you have got any records
25 having to do with these two accounts, which you may not have,

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what's the point of withholding them even if you don't think they are very helpful to the defense?

MR. SORKIN: Your Honor, in effect what we are doing then is extending this to every piece of document we have in our --

THE COURT: No. We are only talking about these two men whose names are alleged somewhere.

MR. SORKIN: Bonavia and Weissinger. Yes, your Honor.

THE COURT: I am not seeking to go outside.

Go back to good old paragraph 5. Here we are, Bank Hoffman AG and accounts for Joseph Bonavia, Account Code name Barbin, Muir Neville Weissinger, and the code name Pompeii and so on.

MR. SORKIN: Your Honor, we oppose it because the purpose of the bill is to inform --

THE COURT: No. This isn't the bill. Discovery. That is an opportunity to look at any bank documents kept in the usual course of business having to do with these two accounts. I don't see what's going to happen to the prosecution if this is done.

MR. SORKIN: Your Honor, we don't feel that the preparation of Mr. Frank's defense or Mr. Stoller's defense -- that at this point when it is our burden to prove that a

2 safe was made to these accounts, that we have to produce the
3 records.

4 THE COURT: Just a minute. I accept that. I
5 already said that. I don't know for sure that it's of any
6 great deal, either, but that's not the test, what you think
7 or what the judge thinks. You must have some records
8 pertaining to these accounts. I think there is no good
9 reason why they shouldn't look at them.

10 I am not asking you to turn the records over to
11 them. I am asking you to allow them to look at them inside
12 your office, or in some room in the U. S. Attorney's office.

13 MR. SORKIN: I take it, your Honor, when you say
14 not turn it over to them, they will not be permitted to make
15 xerox copies and walk out with them. They may be permitted
16 to look at them in our office.

17 THE COURT: If they want to make copies, we will
18 face that when we come to it, but at least let them look at
19 them. You act as though we are really giving away the fate
20 of the nation. For Heaven's sake, we are not.

21 MR. SORKIN: No, your Honor. I don't mean to be
22 acting that way.

23 THE COURT: I will include any Swiss bank
24 Hoffmann records that they may have dealing with those two
25 accounts alleged in Count 5.

2 What else now?

3 MR. DERFNER: The other item of substance is in
4 our demand related to Counts 2 through 12.

5 The first we asked with regard to each count
6 was to identify what acts are charged against Martin Frank.
7 As the Court is aware, these counts charge substantive
8 counts--

9 THE COURT: Now you are talking about particulars?

10 MR. DERFNER: Yes. -- fraud and also they
11 charge 18 U.S. Code, Section 2, which is aiding and abetting,
12 counselling, etc., etc.

13 THE COURT: What else, my boy?

14 MR. DERFNER: We would like to know, your Honor,
15 so we could prepare our defense --

16 THE COURT: What you would like to know?

17 MR. DERFNER: Is Mr. Frank charged as an aider
18 and abetter or is he charged as a prime mover?

19 THE COURT: The government could say he could be
20 both, right, Mr. Sorkin?

21 MR. SORKIN: Absolutely correct, your Honor.

22 MR. DERFNER: In that case we would like to know
23 that.

24 MR. SORKIN: That was not requested, but we make
25 it known now, your Honor.

2 THE COURT: I could answer that. It is always
3 the answer.

4 MR. DERFNER: We may run into the problem of
5 duplicity then, your Honor.

6 THE COURT: No. I won't buy that. Not now, at
7 least.

8 MR. DERFNER: Those are the two items, your
9 Honor.

10 THE COURT: You have won in effect on both.
11 All right?

12 Now, what else? Is there anything?

13 MR. DERFNER: On the bill of particulars and the
14 discovery, no. We have several other motions -- two motions
15 to dismiss and one to sever.

16 THE COURT: What do you want dismissals for?

17 MR. DERFNER: I would like to dismiss the entire
18 indictment, your Honor.

19 THE COURT: Why?

20 MR. DERFNER: One, because it is barred by the
21 statute of limitations and two, because of deliberate
22 prejudicial pre-indictment delay.

23 THE COURT: You have heard of a case in the
24 Supreme Court of the United States appearing at 404 U. S., I
25 think called United States v. Marian?

2 MR. DERFNER: Yes, your Honor. I have the four
3 to three decision.

4 THE COURT: You can't make that motion. That
5 motion is denied now without prejudice to renew it at the
6 proper time. The Court says you should do it at trial.

7 MR. DERFNER: Notwithstanding our showing of
8 prejudice, your Honor?

9 THE COURT: No. You can't show prejudice,
10 according to Marian, until you go to trial. Then you can
11 force the issue by asking the judge once again to consider
12 this question, but not now.

13 So that motion is denied without prejudice.

14 What's next?

15 MR. DERFNER: The statute of limitations, your
16 Honor.

17 THE COURT: How can the statute of limitations
18 affect this?

19 MR. DERFNER: Well, the statute of limitations,
20 as your Honor is aware, is a five-year statute. It is our
21 contention, and I think we have a substantial contention here,
22 that the acts -- the operative acts, the acts within the
23 scope and in furtherance of the conspiracy took place outside
24 of that five-year statute.

25 What the government has done here, your Honor, is

2 include superfluous overt acts and included Counts 2 through
3 10, which are really not -- are only for the purpose of
4 bringing it within the statute of limitations.

5 Your Honor, these Counts 2 through 10 and overt
6 acts 10 through 12, your Honor, are merely part of a scheme,
7 an alleged scheme by the government to cover up the actual
8 conspiracy.

9 The mailing of confirmations, the recommendation
10 of brokers to purchase Training with the Pros after the
11 alleged conspirators divested themselves of their position
12 in the stock is a coverup and is not related to the main
13 conspiracy and, therefore, your Honor, cannot be used to
14 bring this alleged conspiracy and the indictment within the
15 statute of limitations.

16 THE COURT: Let me give Mr. Sorkin a chance.

17 What do you want to say about that?

18 MR. SORKIN: Your Honor, just on the last point,
19 I think the indictment is clear that on its face it is well
20 within the statute. The last overt act charged is well
21 within the five-year period, your Honor.

22 THE COURT: The last overt act is alleged to have
23 taken place in May of 1969.

24 MR. SORKIN: That's correct, your Honor. The
25 indictment was filed February 14, 1974. There was a scheme

2 alleged in this indictment and the scheme continued up to the
3 date of the filing of the indictment.

4 You know, I don't want to belabor the point, but
5 I think on its face it is well within the statute.

6 I also want to point out to your Honor that the
7 question of whether it is within the statute, of course,
8 would have to wait until trial when the government's proof
9 is in.

10 THE COURT: I was just going to observe that.
11 I am going to deny the motion now, however, without prejudice.

12 Depending upon what the proof is, there may be
13 some time-barred problems that could be properly raised by
14 you on behalf of Mr. Frank and indeed perhaps on behalf of
15 all defendants in this general area, so my ruling now on
16 your motion is not with prejudice to anything of that kind
17 that could be raised at trial.

18 MR. DERFNER: I understand.

19 THE COURT: All right.

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20 MR. DERFNER: That leaves one item remaining,
21 your Honor, and that is our motion to sever Counts 11 through
22 16 from this indictment.

23 As the Court is aware, 11 through 16 is merely
24 the inclusion in this indictment of the entire substance of
25 Indictment 73 1050. Its allegations are that Stoller made

false statements before the Securities & Exchange Commission in their investigation of Training with the Pros.

Your Honor, these allegations are totally unrelated to Martin Frank and only tangentially related to the allegations against Philip Stoller in Counts 1 through 10, and certainly if Mr. Frank is forced to go to trial as a co-defendant with Mr. Stoller and the government is permitted to put in evidence of the false statements against Mr. Stoller, the appropriateness and the prejudice against Mr. Stoller would certainly flow to Mr. Frank.

THE COURT: First of all, you admit that Frank runs no risk of being convicted in these particular counts, because he is not named.

MR. DERFNER: That is correct, your Honor.

THE COURT: Second of all, it would be perfectly apparent, it seems to me, that even with the most modest instructions from the judge that we are dealing with quite a different problem in these counts which have nothing to do with Martin Frank at all.

MR. DERFNER: Except, your Honor, I might point out that Martin Frank from time to time has acted as attorney for Philip Stoller.

THE COURT: I don't know that that would come out at trial. At least I will assume for present purposes it will.

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2 but I still make my point. I don't see how in the world
3 Martin Frank could be prejudiced by these false testimony
4 counts, which are certainly levelled squarely against
5 Stoller and the only issue there would be whether or not they
6 are false and material misstatements of fact.

7 MR. DERFNER: Well, your Honor, I think it is
8 not beyond the realm of a substantial possibility that in
9 the mind of a juror who is listening to this case knowing
10 that Martin Frank has acted as attorney for Philip Stoller,
11 that perhaps --

12 THE COURT: Even as a card-carrying member of a
13 fraternity which persists in assuming that all jurors are
14 the stupidest of people on this globe, I can't accept that.

15 Motion denied.

16 MR. DERFNER: Could I just make one point in that
17 regard, your Honor? I think that the possibility of
18 prejudice here is certainly outweighed by the lack of --

19 THE COURT: I understood you to be saying that
20 in effect, in any event, and I don't agree with you. With
21 all due respects, I don't even think it is a close issue.

22 MR. FELDSHUB: May I be heard on that, if the
23 Court please?

24 THE COURT: You said your trustee partner would
25 be heard and he has been heard. Motion denied.

2 May we get to a trial date?

3 MR. FELDSHUH: May I be heard on that, your Honor?

4 THE COURT: You want to be heard, I can tell.

5 MR. FELDSHUH: Your Honor, I will be ready to
6 try this case starting July 8th.

7 THE COURT: How long do you think this is going
8 to take?

9 MR. FELDSHUH: I would imagine on our side we
10 would say it would take an infinitesimal period of time. It
11 would depend upon the government.

12 MR. GOULD: I don't know what that means.

13 MR. FELDSHUH: Our defense will take one day,
14 Judge.

15 THE COURT: All right, Milton Gould, Esquire,
16 what do you say?

17 MR. GOULD: I think we are crazy to try it in
18 July.

19 THE COURT: You are entitled to say that.

20 MR. GOULD: I really do, Judge. How about
21 September? I don't think they are ready to try this case now.
22 How about September?

23 I mean, unless there is some compelling reason
24 that somebody can tell me.

25 MR. FELDSHUH: It's five weeks. The government

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2 was supposed to be ready last year sometime.

3 THE COURT: In fairness to both of you, let's
4 ask Mr. Sorkin. I haven't got a notice of readiness from
5 you.

6 MR. SORKIN: You have not and I indicated to
7 you last week that one would be forthcoming. The practical
8 problems, your Honor, is that Mr. Gould and I will be
9 knocking heads a week from this Monday on a trial that should
10 take approximately a week, which would run us to the 17th of
11 June. Quite frankly, your Honor, the government can't be
12 ready between June 17 and July 8.

13 We indicated to your Honor last time that we
14 would file a notice of readiness and be ready for trial on
15 July 15, or within the latter part of July, the last week of
16 July we could be ready.

17 Quite frankly, your Honor, we think we need at
18 least a month to get ready for this trial. It is a compli-
19 cated case. We are aware of the six-month rule.

20 MR. GOULD: We are not pressing the question
21 under the six-month rule, your Honor.

22 THE COURT: Gentlemen, I have two problems.
23 First of all, I have committed myself to try the National
24 Student Marketing criminal case in September. They claim,
25 and everybody seems to agree pretty much it will take eight

to ten weeks. Oddly enough, the only other case that seems to be ready or about to be ready on my docket besides National Student Marketing is this one.

MR. GOULD: When is Student Marketing set for?

THE COURT: I think it is the 15th or 16th.

MR. GOULD: We can do this in the beginning of September.

THE COURT: How long do you think it will take?

MR. GOULD: A week, ten days.

MR. FELDSHUB: I doubt it will take that long.

MR. GOULD: If you give us a week on this and we start the day after Labor Day, your Honor, we will get out of your way for the Student Marketing.

THE COURT: I think you could be right, but let's find out.

What about it, Mr. Sorkin?

MR. SORKIN: Your Honor, I appreciate the fact that both Mr. Gould and Mr. Feldshub are speaking for the government and they will --

THE COURT: No. I'm asking you to speak for the government.

MR. SORKIN: I don't think it will take two weeks. I think it will probably run beyond two weeks, but I don't think it will run a month. I think we can be done

inside of two weeks to perhaps three weeks at most, your Honor.

THE COURT: One other problem I have is this: I have two very short civil cases where the witnesses are all coming from abroad. One of them is a case where the witnesses are coming from Northern Ireland. The way things are going they may not be alive, but we are scheduled to go right up to Labor Day on that one. That shouldn't take more than two or three days.

I will tell you what. I will put this down to follow Labor Day, whenever that is this year, but I will say in all candor I might have some problems. Let's not worry about them because they may not occur, number one, and also, who knows?

Labor Day this year is the 2nd. How would you like to begin on the 3rd?

MR. FELDSHUH: Make it the 4th, Judge, please.

THE COURT: I won't argue with you, Sidney Feldshuh, Esquire.

What do you think?

MR. GOULD: Okay with me.

MR. SORKIN: That's agreeable, your Honor.

THE COURT: I have got some doubts, but they are my problem and not your doing. I would like to have leave

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2 to consult with you in the summer if I learn something that
3 may throw a slight monkey wrench in this. It won't be
4 very grave, I wouldn't think, though.

5 MR. GOULD: I have committed myself to
6 Mr. Alenstein to give him a month's vacation in August and
7 that's why I am standing here fighting about it. Otherwise
8 it wouldn't make much difference.

9 MR. FELDSHUH: I have committed myself to no
10 vacation, your Honor. I am awaiting your Honor's vacation.

11 MR. SORKIN: As your Honor knows, the government
12 doesn't take vacations, so that rounds out the threesome,
13 your Honor.

14 MR. FELDSHUH: But you have my permission, your
15 Honor.

16 MR. GOULD: Thank you very much.

17 THE COURT: I will reserve on those remaining
18 issues that have not been ruled upon in your respective
19 motions.

20 Wait a minute, there is one thing we haven't
21 covered. I would suggest that some time in perhaps either
22 June or July I would like to see us have this hearing. I
23 think this hearing of what went on in the airport shouldn't
24 last more than a couple of hours.

25 MR. SORKIN: Clearly, your Honor.

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2 THE COURT: I would suggest, Mr. Sorkin, you
3 can consult with I assume you, Mr. Alenstein, as to a
4 couple of alternative dates that would suit you. I have
5 just committed myself to spend several weeks calling cases
6 for other judges. Judge Pollack and I are going to do this
7 with the court in the next few weeks or month or so, but
8 that's no matter. You tell me a couple of mutually
9 convenient dates and I am sure I can meet one of them.

10 MR. SORKIN: Your Honor, let me say this. The
11 problem we have always had with this is who Mr. Stoller wants
12 to call from the Bureau of Customs and from the U. S.
13 Attorney's office. We still have that problem. I would ask
14 Mr. Alenstein at this time, so we can get this thing
15 expedited, to let us know who he wants us to get in touch
16 with.

17 MR. GOULD: He doesn't know who the people are.
18 You know who they are.

19 MR. SORKIN: Just let me finish.

20 THE COURT: Hold on. The problem is, though,
21 Mr. Alenstein, very simple. To the extent you know, let
22 him know.

23 MR. ALENSTEIN: Certainly.

24 THE COURT: Mr. Sorkin long ago before you came
25 into the case, agreed to cooperate and produce whoever

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2 Stoller wished produced, unless he had somebody up on Mars.

3 MR. ALLENSTEIN: I will let him know next week.

4 It should be no problem.

5 THE COURT: All right, very good.

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